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23 December 2002

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Triennial Review* proceeding, WCB Docket Nos. 96-98, 01-338

Dear Ms. Dortch:

On December 20, 2002, the undersigned, together with Charles Hoffman, President and CEO of Covad Communications, Brad M. Sonnenberg, General Counsel of Covad Communications, and Praveen Goyal, made an *ex parte* presentation to Commissioner Kevin Martin, Dan Gonzalez, and Emily Willeford, in the above-referenced proceeding. In the course of this *ex parte* presentation, representatives of Covad reiterated positions already set out in the record of this proceeding. In particular, Covad highlighted the following points in response to Commission Martin's December 12, 2002, speech on broadband issues:

1. Commissioner Martin has spoken publicly about encouraging facilities-based deployment and competition. Based on the availability of linesharing, Covad has spent the last several years and hundreds of millions of dollars building out a nationwide facilities-based DSL network to serve residential consumers in 35 states. Covad is the only DSL provider – ILEC or CLEC -- that serves residential consumers on a nationwide basis. We are a DSL provider for customers of AOL, AT&T WorldNet, and Earthlink – three of the largest consumer ISPs in the country. We have purchased and deployed all of our own switches, all of our own DSLAMs, and all of our own equipment – all we need are raw transmission facilities, the core of the ILEC bottleneck. The record in this proceeding demonstrates conclusively that a cable modem/broadband duopoly harms consumers – it does not expand deployment, and it does not reduce prices. For example, before the FCC adopted linesharing rules in 1999, Verizon had not yet launched DSL throughout its monopoly territory, and when it did, Verizon DSL was priced at \$70 per month. This despite the fact that cable modem services had been deployed since 1994 in the Verizon territory. Today, thanks to Covad's entry breaking up the duopoly, DSL is widely deployed by CLECs and ILECs alike, and it is priced at \$39.95.
2. Covad highlighted the irony of restricting the availability of UNEs to facilities-based DSL providers premised on the RBOCs non-dominant position as a retail provider of DSL. As the record demonstrates conclusively, RBOCs are in second place in broadband because cable has the first-mover advantage. Cable has that advantage because the RBOCs gave it to them. DSL technology has been available since the late 1980s. RBOCs failed to deploy it commercially for the better part of a decade in which even by their own calculus they could have reaped 100% of the benefits of any deployment. They had the technology for years prior to the 1994 deployment of cable modems, and for years before the beginning of DSL deployment. Indeed, Covad was first to deploy commercial DSL technology – before any RBOC did so.
 - a. The logical response to this situation would be to encourage competitors like Covad and other CLECs, without whom DSL deployment would never have occurred, and would not be occurring today at such a rapid pace. To instead hand the RBOCs an unquestioned monopoly in residential DSL because of the situation they created through the willful suppression of this technology is perverse.

- b. Verizon in particular (cited as the source of the policy construct in Commissioner Martin's speech) has been a pernicious opponent of competition. About one month after Covad rolled out its residential service, and about 2 weeks after Covad sued Verizon for antitrust violations, Verizon's response was to bring a frivolous patent infringement case against Covad which Covad won on summary judgment. Apparently only interested in inflicting costs on Covad rather than asserting any kind of meritorious claim, Verizon brought a second case against Covad in federal court—a highly contrived fraud case. Covad also prevailed in that suit on summary judgment.
3. The line-sharing position set out in Commissioner Martin's speech is premised on the conclusion that RBOCs are "non-dominant." That is not the unbundling test mandated under the Act, which instead requires the Commission to analyze whether a requesting carrier would be impaired in providing the telecommunications service it seeks to provide in the absence of linesharing. Without line-sharing, Covad is precluded from offering residential DSL service to anyone who has BOC voice service.
4. The RBOCs provide their DSL services using line-sharing on their own loops. Indeed, that is what ADSL service is *designed* to do – operate on a shared line with voice service. As the record demonstrates conclusively, linesharing is beyond question the only technically and economically feasible way to offer ADSL. With linesharing, consumers do not need an extra phone line, they need not wait at home for two technicians to install the loop and then retail service, they can self-install the service, and they need not worry about the "no-facilities problem" that plagues CLEC customers, because the existing loop is used.
5. Line sharing is loop unbundling that meets the technical needs of ADSL service – the upper frequencies of voice loops. It is far from easy to provide a facilities-based residential service using line-sharing:
 - a. Must build a nationwide network that can scale to more than a million customers. Consumer business makes no sense at small scale.
 - b. Must invest in DSLAMs, line cards, and other CO equipment.
 - c. Must invest in CO builds.
 - d. Must develop ATM network. Covad owns and paid for a massive deployment of ATM switches. Covad is the second largest owner of ATM switches—more than any RBOC.
 - e. Must drive costs out of your business and become so efficient you can compete at residential price levels versus much larger RBOCs and cable companies.
 - f. Must hire and train people who developed and manage this network.
 - g. Must develop the nascent DSL equipment market by funding growth of new providers: Diamond Lane (Nokia High-Speed Access Products), Efficient Networks (Siemens).
 - h. Anyone who wants to make that kind of investment and contribution should be able to access line-sharing. That none of the business-only DSL players have done so suggests it is extremely difficult to have the will and skill to do all of this.
6. Pricing of high-frequency portion of the loop:
 - a. The RBOCs prepare cost studies that show that the cost of the upper frequency of the loop in lineshared service offered to their own retail affiliates is 0. They then set a retail price for the service based on the 0-loop cost they themselves have chosen to allocate to the line-shared service. No need to feel sorry for the RBOCs—they recover 100% of the loop cost from the voice customer. CLECs cannot offer a service that requires the delay and expense of provisioning a new phone line, and that is priced based on the cost of a full phone line—in addition to all the other charges for OSS, for ordering, etc., while the RBOCs are offering the same service without all of those disadvantages. Nor should society want that to happen—it would be an inefficient way to use the loop plant.
 - b. Linesharing pricing accurately states the incremental cost based on RBOC's own cost attributions. To the extent any modifications need be made, the state commissions are the proper venue to do so.

- c. RBOCs can change this at any time, but they view it as being in their own self interest not to. Covad pays significant non-recurring and recurring charges to actually access the UNE—e.g., splitter costs, OSS costs, cross-connects, ordering charges, repair and maintenance charges, etc.
- 7. Line-splitting is vitally important, but it is a complement to, not a substitute for, linesharing. Linesplitting is necessary in the UNE-P environment, because it permits consumers to choose the voice product of one CLEC and combine it with the residential DSL product of another CLEC. Similarly, linesharing allows consumers to choose the voice product of the ILEC and combine it with the residential DSL product of a CLEC. But eliminating linesharing would restrict CLECs to only those consumers who desire to give up ILEC voice service, which is currently less than 10% of the US population. It gates CLECs as DSL providers by requiring that CLECs, either by themselves or with some partner, be as successful as selling voice service as they are at selling DSL service. It denies consumers the choice of DSL provider and voice provider, effectively tying those two services together. It precludes CLECs like Covad from offering customers the service that we think we most distinctively provide (DSL), and that we think offers the greatest value add for the customers, unless we offer another service that we view as less distinctive, less directed to the central area of customer dissatisfaction with RBOC service, a service for which we have no brand recognition, and a service that has historically proven impervious to facilities based competition.
- 8. The USTA decision does not preclude the FCC from re-adopting line-sharing. Indeed, the decision specifically affirms the FCC's conclusion that linesharing is a "network element." It simply addresses the undeniable fact that the FCC in its original two orders did not address the relevance or lack thereof of cable modem deployment. When the FCC does so, it must do so under the impairment standard mandated by the Act rather than free-standing notions about whether the RBOCs are "dominant" in residential broadband.

Respectfully submitted,

/s/ Jason Oxman

Jason D. Oxman
Vice President and Asst. General Counsel